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No. 96-1570

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES COMPANY,
and NEW YORK TELEPHONE COMPANY,
Petitioners,

v.

DISCON, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE SECOND CIRCUIT'S SECTION 1 HOLDING SHOULD BE REVERSED

Discon seeks to preserve its Section 1 claim in two ways. First, it argues that the question presented is limited to *per se* liability, thus foreclosing consideration of, and preserving for further litigation on remand, the question of rule-of-reason liability. Second, on the merits, while Discon now disclaims any anticompetitive effect in the telephone-service market, Discon tries to explain why it has sufficiently alleged anticompetitive effects in the sale of removal services.

Neither argument has merit. The Second Circuit's sole basis for reviving the Section 1 claim (extending "group boycott" doctrine, whether triggering *per se* or rule-of-reason analysis) and its sole rationale (its finding of anticompetitive effects, whether in telephone-service or removal-services markets) are squarely before this Court. And, with any claim of harm to competition in the telephone-service market properly out of the case, Discon's arguments about the sale of removal services starkly confirm that its allegations state no more than harm to itself as a competitor, rather than any marketwide harm to competition.

A. The Petition Encompasses The Entire Basis For The Second Circuit's Revival Of The Section 1 Claim And Its Rationale That There Are Sufficiently Alleged Anticompetitive Effects

Seeking to avoid this Court's consideration of whether the amended complaint adequately alleges anticompetitive effects, Discon argues that the first question presented does not fairly include the issue of rule-of-reason liability. *See* Discon Br. 20. Surprisingly, the Government makes this argument as well (SG Br. 17-19), even though at the petition stage the Government gave no hint that any of its extensive discussion of anticompetitive effects and rule-of-reason liability was addressing issues not properly before the Court (SG Pet. Br. 6-17). This argument is doubly mistaken. First, its premise that rule-of-reason liability is outside the scope of the petition is wrong. Second, the conclusion would be wrong even if the first question presented were limited to *per se* liability: the Second Circuit's sole rationale, finding anticompetitive effects, would be present regardless.

1. Discon and the Government are flatly incorrect in contending that the first question presented is limited to whether *per se* liability is available. The question does

not even use the language of "*per se*" liability.[1] Rather, it uses the Second Circuit's own language of "group boycott." The Second Circuit articulated one and only one basis for reviving Discon's Section 1 claim: that "group boycott" doctrine, though historically applicable only to agreements involving competitors, should be "extended" to this case, whether that extension ultimately would trigger *per se* or rule-of-reason analysis. Pet. App. 11a-13a & n.6. The evident point of the group-boycott-extension ruling (regardless of whether *per se* or rule-of-reason analysis would follow) was to distinguish this particular two-firm vertical nonprice agreement from the mine-run of purchaser-supplier agreements—which are routinely approved by the courts (NYNEX Br. 23-24 & n.18)—and stamp it with the special heightened suspicion of anticompetitive effects attaching to "group boycotts." The first question in the petition, by its terms, sought review of the "group boycott" ruling, the full basis for the Second Circuit's resurrection of Discon's Section 1 claim.

The argument that the question excludes rule-of-reason liability rests on a simple error: it misunderstands the Second Circuit, and hence the petition, to have used "group boycott" as co-extensive with *"per se."* SG Br. 11-18. The Second Circuit, following its own prior usage (*see* NYNEX Br. 16-17 (citing cases)) and the usage common in other circuits,[2] indisputably used "group boycott" to encompass agreements that might be judged

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[1] "When a Purchaser agrees to buy from Supplier A rather than Supplier B, and there is no issue of any horizontal restraints or vertical price restraints: 1. May the agreement between Purchaser and Supplier A be characterized as a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?" Pet. i.

[2] *See, e.g., Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1550 (11th Cir.), *cert. denied*, 117 S. Ct. 75 (1996) (not all "group boycotts" are subject to *per se* condemnation); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1411-12 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991) (same); *Collins v. Associated Pathologists*, 844 F.2d 473, 479-80 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988) (same).

under either *per se* or rule-of-reason standards.[3] The Second Circuit expressly indicated its understanding that at least some "two-firm group boycott[s] should be judged under [the] rule of reason" (Pet. App. 12a, summarizing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725-31 & n.4 (1988)), and in its critical statement that either a *per se* or rule-of-reason standard might be available on remand, it expressly referred to "applying the rule of reason to two-firm group boycotts." Pet. App. 13a n.6. Not surprisingly, then, Discon, despite its brief effort to limit this Court's inquiry, has unambiguously acknowledged that the Second Circuit's "group boycott" ruling in fact covered both the *per se* and rule-of-reason standards (Discon Br. 10):

> The Court of Appeals concluded that a vertical agreement between a firm and its supplier to exclude a competing supplier may be treated as a "group boycott", addressable both under the rule of reason and the *per se* rule if the "restraint of trade has no purpose except stifling competition."

The petition, in directly challenging the Second Circuit's extension of "group boycott" doctrine to this case, thus

[3] Contrary to the Government's assertion (SG Br. 13 n.7), this Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), similarly used "group boycott," a synonym for "concerted refusal to deal," to encompass both *per se* and rule-of-reason standards: it expressly approved the district court's statement that "[e]ven if it is a group boycott, . . . the Rule of Reason operates" in that case. *Id.* at 297 n.9; *see* NYNEX Br. 17 n.14. In any event, any dispute about *this Court*'s usage is ultimately irrelevant. The question presented, in challenging the Second Circuit's holding that "group boycott" should be extended, necessarily was referring to what the *Second Circuit* meant by "group boycott," plainly covering both *per se* and rule-of-reason situations. It is bizarre for the Government to criticize (and thus acknowledge) the Second Circuit's usage of "group boycott" as embracing agreements that are *not* necessarily *per se* invalid (SG Br. 15-16; SG Pet. Br. 12-13) and then to turn around and deny that the broader usage is precisely what is adopted in the question presented.

encompasses both the *per se* and the rule-of-reason standards that the Second Circuit concededly invoked under that rubric.[4]

2. Even if the first question were improperly read as limited to *per se* liability, the issue of whether anticompetitive effects have been sufficiently alleged in the telephone-service or removal-services markets would be squarely encompassed within the question. The Second Circuit's one and only affirmatively stated rationale for its Section 1 ruling (extension of group boycott analysis) was its conclusion that the alleged conduct was "entirely anti-competitive." Pet. App. 12a; *see Electronics Communications Corp. v. Toshiba America Consumer Prods.*, 129 F.3d 240, 244-45 (2d Cir. 1997) (*Discon* decision rests on finding that alleged conduct was "manifestly anticompetitive"). In so holding, the Second Circuit did not "clearly identify" (SG Br. 7 n.5) whether it was referring to an anticompetitive effect in the telephone-service market or an anticompetitive effect in an alleged removal-services market. *See also* Discon Br. 8-9 ("[t]he circuit court did not specifically identify any specific market affected . . . [or] a particular anticompetitive effect") (footnotes omitted). Accordingly, NYNEX's opening brief, far from ranging beyond the question presented, squarely addressed the Second Circuit's "entirely anticompetitive" conclusion as applied to each of the two market levels at issue, arguing that the alleged fraudulent overcharging of ratepayers did not constitute an anticompetitive effect in the tele-

[4] That the first question presented challenges the Second Circuit's full Section 1 holding (including rule-of-reason liability) is confirmed by the second question presented, which challenges the court of appeals' Section 2 conspiracy holding. NYNEX's initial ground for arguing that the alleged agreement cannot be an unlawful Section 2 conspiracy is that otherwise—as the Government expressly agrees (SG Br. 20 n.12)—it would then have to be an unlawful Section 1 conspiracy. *See* NYNEX Br. 40; Pet. 14-15; page 17, *infra*. The basis for that argument is the absence of any valid Section 1 liability, *per se* or rule-of-reason.

phone-service market (NYNEX Br. 27-36) and that there was no sufficient allegation of harm to competition in the sale of removal services (*id.* at 36-39). It is unheard-of to view this direct challenge to the rationale for the ruling presented for review as somehow outside the question presented.[5]

B. The Amended Complaint Does Not Sufficiently Allege The Required Harm To Competition

The Second Circuit reinstated Discon's Section 1 claim because it deemed the alleged agreement "entirely anticompetitive." To defend the decision, Discon must show, at the least, that the alleged agreement harmed competition, not just Discon as a competitor. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). Discon must meet a still higher standard to justify, as it briefly tries to do (Discon Br. 14-19), any *per se* illegality; the agreement would have to be of a type that has such "limited potential for procompetitive benefit" and "such predictable and pernicious anticompetitive effect" (*State Oil Co. v. Khan*, 118 S. Ct. 275, 279 (1997)) that it "would always or almost always" harm competition (*Sharp*, 485 U.S. at 723 (internal quotation marks omitted)). Here, neither standard is met.

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[5] The imprecision in the Second Circuit's opinion led the Government, in its brief at the petition stage, to defend the Second Circuit's ruling principally based on supposed anticompetitive effects in the telephone-service market (SG Pet. Br. 8-12), while Discon now insists that the Second Circuit was referring only to "the removal services market" (Discon Br. 30). As noted below, Discon's new disclaimer of any reliance on anticompetitive effects in the telephone-service market removes the issue from the case, but that disclaimer on the merits hardly means that the issue, as one of the two possible interpretations of the Second Circuit's rationale, was outside the question presented. Similarly, the novelty of the Government's petition-stage reliance on anticompetitive effects in the telephone-service market—a novelty that the Government mistreats as making the issue difficult rather than easy (SG Br. 18-19)—does not exclude the issue from the question presented.

As the Government agrees (SG Br. 11-17), *per se* liability plainly cannot apply: this Court repeatedly has held that nonprice vertical agreements (tying agreements aside) are subject only to a rule-of-reason standard. *See* NYNEX Br. 20-21. Those holdings rest on the recognition (*id.* at 21-24; SG Br. 15) that even an exclusive-dealing agreement, let alone an agreement by a purchaser merely to "favor . . . one supplier over another" (Pet. App. 12a), typically serves legitimate procompetitive objectives, such as stability of supply and reduced transaction costs. The factual allegations here identify, at most, an agreement by NYNEX to buy only from AT&T and not from Discon, *i.e.*, at most an exclusive-dealing agreement. (As for procompetitive justification, Discon has itself unexpectedly pointed to, while denying, a specific legitimate basis for NYNEX's not buying from Discon, namely, Discon's improper dealings with a NYNEX employee. *See* NYNEX Br. 4-5.)

Even if the agreement were alleged to have a purpose to exclude Discon, a particular competitor, from the market, *per se* liability still would be improper. The contrary legal position is urged by one *amicus* brief, which recognizes that the factual allegations in the amended complaint do not actually identify a NYNEX agreement to do any more than cease using Discon as a supplier. Law Professors *Amicus* Br. 4-6.[6] This position is fundamentally inconsistent with this Court's precedents and would broadly "subsume the rule of reason" in supplier- or dealer-substitution cases because of the ease of making an allegation of purpose to exclude. Ass'n of Bar of City of New York

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[6] The *amicus* brief (at 4-5 n.3) discusses two possible exceptions, and then immediately discounts them. One involves allegedly defamatory statements about Discon, but, among other deficiencies, there is no allegation that such statements were, or were intended to be, republished to harm Discon's relationship with other buyers. The other involves NYNEX's alleged compulsion of Discon to injure a scrap-metal buyer, but, among other deficiencies, there is no allegation that the conduct was pursuant to any agreement with AT&T.

Amicus Br. 8-9 n.4. It is also insupportable under basic antitrust principles. An allegation of "purpose" to exclude (Law Professors *Amicus* Br. 11) by its terms addresses only harm to a particular competitor and adds nothing about any harm to marketwide competition, which is antitrust law's concern. *See id.* at 13 (treating such an exclusion agreement as "not directed at competition in the usual antitrust sense"). At the same time, allowing such an allegation to change the legal standard would generate costly and uncertain inquiries into the parties' purpose in order to distinguish, as the proposed theory itself requires, ordinary exclusive-dealing agreements whose known consequence (but not "purpose") may be to drive a particular firm out of business.[7] Thus, any such approach, which is not supported by the Government, is unrelated to any presumptive harm to competition (as opposed to a competitor) and would violate this Court's commitment to "protecting the doctrine of *GTE Sylvania*" to preserve broad freedom for vertical nonprice agreements. *Sharp*, 485 U.S. at 726; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *See also* ABA Antitrust Section, *Statement on Discon v. NYNEX* at 5-7 (http://www.abanet.org/antitrust/discon.html).[8]

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[7] The *amicus* brief confirms the inevitable resulting uncertainty by its refusal to characterize the very agreement in this case. *Id.* at 9-11. Moreover, this Court and others have expressed criticism of any antitrust focus on "purpose" or "intent" separate and apart from the terms of any agreement or action and its actual and foreseeable effects. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03 (1985); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) (rejecting reliance on plaintiff's claim that defendant " 'intended' to drive [plaintiff] from the market place").

[8] The *amicus* brief (at 8) incorrectly infers Professor Areeda's support for its proposal from one sentence discussing the dissent in *Sharp* (VIII P. Areeda, *Antitrust Law* ¶ 1625d (1989)), ignoring the immediately surrounding context of that sentence. Profesor Areeda did not endorse a *per se* rule for nonprice vertical agreements. *See also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1644'c (Supp. 1997) (criticizing *Discon* decision).

The agreement challenged in this case is not only of a type that cannot be found "almost always" anticompetitive (*Sharp*, 485 U.S. at 723); it is not, on the facts alleged, anticompetitive at all. While Discon notes this Court's caution that dismissals before discovery "should be granted very sparingly" (*Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976), quoted at Discon Br. 21), such caution has never meant abdication where the standards for dismissal are met: dismissals in antitrust cases for insufficient factual allegations of required elements are anything but rare.[9] Discon thus recognizes that the district court is entitled to demand "some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), quoted at Discon Br. 13. Discon accepts that the dismissal standard " 'does not permit conclusory statements to substitute for minimally sufficient *factual* allegations' " (*Electronics Communications Corp.*, 129 F.3d at 243 (emphasis added)), which must themselves show, if ultimately supported by evidence, all of the "material elements necessary to sustain recovery under some viable legal theory" (*Car Carriers*, 745 F.3d at 1106, quoted at Discon Br. 13). Thus, "[b]ecause the antitrust laws were enacted for the protection of competition, not competitors," Discon's

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[9] *See, e.g., Electronics Communications Corp., supra* (2d Cir.); *SmileCare Dental Group v. Delta Dental Plan, Inc.*, 88 F.3d 780 (9th Cir.), *cert. denied*, 117 S. Ct. 583 (1996); *Dial-A-Car, Inc. v. Transportation, Inc.*, 82 F.3d 484 (D.C. Cir. 1996); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987); *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982); *Havoco of America Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980).

amended complaint was required to "allege facts that would show an anticompetitive impact on the market as a whole." *Dial-A-Car*, 82 F.3d at 486. Discon's brief makes clear that its only theories of supposed competitive harm fail to meet that elemental standard. Accordingly, dismissal was proper.

1. *The Allegations Do Not Establish Harm To Competition In The Sale Of Telephone Service*

For two reasons, no finding of harm to competition in the telephone-service market can support the Second Circuit's ruling here. First, Discon has now vigorously and repeatedly disclaimed any such reliance on any anticompetitive effect in the telephone-service market. Rather, while continuing to rely on the alleged regulatory fraud to explain the alleged conduct, Discon now insists that all it has alleged, and all the Second Circuit found, was anticompetitive harm "in the removal services market" as a result of the alleged fraudulent overcharging of telephone-service ratepayers. Discon Br. 30; *see id.* at 3, 5-6, 9 n.6, 10, 14, 23 n.13, 29, 30-32. Indeed, Discon affirmatively suggests that any claim of harm to competition in the telephone-service market—in which Discon was not a competitor and where no effect on competition among rival sellers is at issue—would be legally wrong. *Id.* at 30-32. This insistent disclaimer is sufficient to remove any such claim from the case. The allegations of regulatory fraud remain only as Discon's own explanation of the conduct at issue—an explanation that, as noted below, decisively confirms that Discon has alleged only a fraud and not a *market*-constraint problem at all.

Second, and in any event, the idea that the alleged fraudulent overcharging of ratepayers brought about a *competitive* harm in the telephone-service market is patently incorrect. NYNEX's opening brief set out why that idea is both plainly wrong and pernicious. NYNEX Br. 27-36. No answer to this showing has been advanced.

In fact, Discon, far from disputing the analysis, has itself suggested that a reason for not reading the Second Circuit opinion to focus on competitive harm in the regulated market is that such a theory would be "counterintuitive." Discon Br. 32; *see id.* at 30-32.

Nevertheless, the Second Circuit is naturally understood to have relied on ratepayer overcharging as an anticompetitive effect, and the Government expressly endorsed that notion at the petition stage (SG Pet. Br. 8-12)—though it now has notably refused to readvance that ill-considered position. This Court should reject the theory on the merits. The theory is " 'novel' " (SG Br. 19) in that it is indefensible for long-recognized, simple, and compelling reasons: notably, regulatory fraud is not itself an antitrust problem and excess pricing by a lawful monopolist is not anticompetitive. NYNEX Br. 27-36. Despite the Government's plea (SG Br. 19), no further lower court development on the issue is needed. Meanwhile, the Government's initial legal position, elaborating the Second Circuit's apparent meaning, will inevitably cause mischief in litigation, having already attracted the attention of the antitrust bar. *See* Davis, "Discon v. NYNEX," *Antitrust* 53, 57 (Summer 1998). This Court should definitively lay it to rest.

2. *The Allegations Do Not Establish Harm To Competition, Rather Than Harm To A Particular Competitor, In The Sale Of Removal Services*

Discon accepts that, to survive dismissal, its allegations must be sufficient—without the addition of "facts that it has not alleged" (*Associated General Contractors*, 459 U.S. at 526)—to establish harm not just to itself but to competition marketwide and, moreover, that "this approach is often formulated as a requirement of proof of actual or threatened market power." Discon Br. 23-24; *see* NYNEX Br. 22 n.17. The necessary harm to marketwide competition requires allegations showing a threat that

buyers will be forced to accept supracompetitive prices as a result of an overall impairment of competitive alternatives from existing or potential competing sellers. Importantly, as has repeatedly been recognized, "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *see, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 120 n.15 (1986); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.); *Dial-A-Car*, 82 F.3d at 488; *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425-26 (9th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994); *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1335-36 (7th Cir. 1986).

Discon has done nothing to fill the decisive gaps in its allegations, making unsustainable any inference of marketwide harm, or even harm to other current or potential removal-services providers, from the facts alleged. In particular, Discon has no answer to the obvious lack of any significant entry barriers (or any nontrivial minimal scale of entry) in this low-technology business of dismantling and discarding telephone switching equipment. According to Discon itself, telephone companies can and do simply use their own employees to do this work; and Discon itself, within months of its formation, obtained a $500,000 contract and had 25 employees (with plans to triple). *See* NYNEX Br. 37-38. Moreover, Discon has said nothing about other existing and potential sellers of removal services and their prices. Nor has it said anything about effects on other buyers of removal services to the extent it has alleged a market beyond NYNEX as the sole buyer (Discon now concedes that Rochester Telephone, for example, is a buyer in the "removal services market," Discon Br. 39). Nor, finally, has Discon made any less implausible and strained its essential contention that NYNEX was agreeing to subject itself as a buyer to con-

stricted marketwide competition among suppliers of removal services—when such a result would be a form of self-inflicted injury, would be implausible to achieve given the absence of entry barriers (and its ability to do the work itself), and would be unnecessary to carry out the alleged fraudulent profit-making scheme.

Discon responds in essentially four ways, but the arguments merely confirm the insufficiency of the amended complaint's allegations. First, and most importantly, Discon repeatedly reveals the totality of its true basis for asserting competitive harm: nothing other than harm to itself as a competitor. Discon states in a section heading: "competitive harm alleged by Discon was *its* exclusion from the unregulated supplier markets." Discon Br. 29 (emphasis added; capitalization omitted). In its initial section on "allegations of harm to competition" (Discon Br. 21 (capitalization omitted)), Discon concludes: "the effect is the elimination of a competitor and, consequently, elimination of competition." *Id.* at 23. *See also id.* at 27 ("The 'nature and effect' of the alleged conspiracy was to effect the exclusion of a competitor from, *and thus lessen competition in*, the market for removal services.") (emphasis added); *id.* at 10 ("The anti-competitive effect of the conspiracy was the suppression of competition in the unregulated removal services supplier market by the exclusion of Discon."). Without any allegations as to other sellers or entry barriers in this disposal business, and with the challenged conduct explainable without regard to any marketwide harm to competition, Discon is reduced to complaining of nothing more than its own harm. Nothing is better settled in antitrust law than that such harm is not harm to competition. *See* NYNEX Br. 15, 23-24.

Second, Discon briefly relies on the allegation that some prices paid by NYNEX were higher as a result of the alleged agreement. Discon Br. 22. In addition to saying nothing about prices to other buyers (or market prices

generally), however, that allegation does not, in this case, imply any *market*-constraint problem at all. Discon's own allegations of a regulatory-evasion scheme provide a complete explanation of such raised prices (*e.g.*, Discon Br. 35, 39), thus removing any basis for inferring that the alleged prices resulted from market constraints in the sale of removal services. One buyer's choice to pay higher prices, fully explicable without regard to impaired competition, in a market without entry barriers (or shortage of other sellers), does not show harmed *competition*.

Third, Discon repeatedly relies on the allegation that NYNEX (specifically, MECo) had to certify which suppliers would be allowed to sell to it. Discon Br. 24-26, 32-34; *e.g.*, *id.* at 34 ("Discon, as well as other vendors, had to be approved by MECo"). The significance of that allegation is a mystery. Every firm has the power to decide, and must decide, who will be its suppliers. And even the exercise of that power to choose a single supplier could not imply anticompetitive effects, for that is the choice made in every exclusive-dealing situation. Here, there is no allegation that NYNEX's certification decisions for itself blocked choices by other buyers of removal services, either legally or by way of some relevant minimum scale of entry for this business.

Fourth, Discon argues that it is economically plausible that NYNEX would have engaged in the alleged regulatory fraud. Discon Br. 35. Discon has attacked a straw man. The point is not that the conduct is implausible. Nor is it that, in the abstract, a buyer can never rationally foster a seller's market power—even when, as conceded here, it is cost-imposing to do so (SG Br. 28)—or that implausibility of a buyer's self-infliction of injury, standing alone, sets a "heightened pleading standard" (SG Br. 23) or always requires dismissal. Rather, the point is that the very profit-making mechanism of regulatory fraud alleged by Discon did not plausibly require NYNEX to limit (as it could not plausibly do in any event) its future ability to

buy removal services at competitive prices whenever it wished (from existing sellers or readily available new entrants).[10] And that implausibility of a nexus between the alleged fraud scheme and self-injuring creation of supply-market harm confirms that, in this setting, the utter absence of alleged entry barriers or other bases for inferring marketwide harm leaves the "specificity" standard of *Associated General Contractors* unsatisfied.

In the end, Discon's argument confirms that it has alleged no more than a regulatory fraud resulting in harm to it, and it alone. There are no allegations of facts sufficient to show harm to marketwide competition. Because the freedom to change suppliers is at the core of competition, this Court must insist upon such allegations if the antitrust laws are not to be used by suppliers to deter their termination and thus undermine the process of competition itself. Discon has had ample opportunity to advance a sustainable theory of anticompetitive harm that might warrant continuing costly litigation on its amended complaint. It has failed to do so. Dismissal was proper.

II. THE SECOND CIRCUIT'S SECTION 2 HOLDING SHOULD BE REVERSED

Discon's efforts to preserve its Section 2 conspiracy-to-monopolize claim are as unsound as its Section 1 arguments. As with its Section 1 defense, Discon attempts to limit the scope of the question presented and also defends the Second Circuit's ruling on its merits. Both arguments should be rejected.

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[10] Neither Discon nor the Government provides a realistic explanation of how an effort to eliminate Discon or other removal-services competitors to AT&T could reasonably succeed (given the nature of the work and the ease of entry) or how such a futile effort would significantly advance the alleged regulatory fraud. Presumably, the worse a firm like Discon was hurt, and the greater the number of such injured suppliers, the *more* likely regulatory officials would be to hear complaints, as they in fact did from Discon.

A. Discon briefly suggests (Discon Br. 38), following the Government (SG Br. 24-25), that the second question presented is limited to whether any agreement by a purchaser to buy from one supplier rather than another "*ever*" can be a conspiracy to monopolize (*id.* at 24). But this argument gives an unfair—because distinctly implausible—reading to the question, interpreting it to make only an extraordinary request for *per se legality* under Section 2 of all supplier-change agreements, no matter what their content or circumstances. Moreover, because the abstract question whether a supplier-change agreement could "ever" be a Section 2 conspiracy would be almost nonsensical, consideration of the particular facts here is a "predicate to an intelligent resolution" of the question of Section 2 conspiracy standards [11]—as Discon fully accepts for the similarly phrased *first* question presented. *See* Discon Br. 14-17, 20; Br. in Opp. 8-14; *see also* SG Br. i, 11, 15. In these circumstances, the question presented properly includes whether the "central premise of the question and the assumption on which it is based" apply in the particular case [12]—here, whether the agreement alleged is legally distinguishable, for Section 2 conspiracy purposes, from the ordinary purchaser agreement to buy from one supplier rather than another. Not surprisingly, then, Discon's brief in opposition focused on the particular agreement, arguing that it differed from the usual supplier-change agreement and never suggesting that

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[11] *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see, e.g., Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 476 n.13 (1996); *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996).

[12] *Bragdon v. Abbott*, 118 S. Ct. 2196, 2210 (1998). In *Bragdon*, this Court readily treated a question presented that asked whether courts "should defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge" (*see id.* at 2209-10) as including "the implicit assumption in the question presented, whether [the particular health care provider's] actions were reasonable," thus embracing "the application of the rule to the facts of this case." *Id.* at 2211; *see id.* at 2209-13.

only an abstract "can it ever be" question was presented. Br. in Opp. i, 14-15; *see Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 n.12 (1992). Thus, the question presented is whether the allegations in this case, if proved, could support liability for conspiracy to monopolize under Section 2.

B. On the merits, the Section 2 claim fails because the Section 1 claim fails. Discon nowhere disputes, and the Government expressly agrees, that, if the alleged agreement cannot give rise to Section 1 liability for conspiracy in restraint of trade, then *a fortiori* it cannot give rise to Section 2 liability for conspiracy to monopolize. SG Br. 20 n.12. This principle, resting on the elementary proposition that an agreement to create or maintain a monopoly by exclusionary means is an anticompetitive agreement (NYNEX Br. 40), states an essential limit on the little-used portion of Section 2 that addresses concerted action. Section 2 has never been and should not now become an avenue for an antitrust plaintiff to evade the fundamental Section 1 requirement of proving constriction of the market, substituting a pure "specific intent" standard that could generate costly discovery and uncertain litigation if there were no threshold objective standards requiring actual or realistically threatened marketwide impact. A contrary conclusion would vitiate the protections for market freedom established by the important limits on antitrust liability under Section 1. Because the Section 1 standards are not satisfied, for all the reasons previously explained, Discon's Section 2 conspiracy claim —which "amounts to nothing more than its § 1 claim under another name" (*FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977))—must be dismissed as well.

Discon's Section 2 conspiracy claim also must directly fail, for two reasons. First, as the Government seems to acknowledge (SG Br. 29), and Discon does not deny, its

amended complaint does not, fairly read, allege that the object of the alleged conspiracy was to make AT&T a seller of removal services with monopoly power. Rather, as Discon told the Second Circuit, the allegation was that *NYNEX* would be the monopolist—an allegation that the Second Circuit properly rejected (and that is not defended here). *See* NYNEX Br. 11 n.12, 41. The Section 2 conspiracy claim cannot be resurrected on the basis of "facts that it has not alleged." *Associated General Contractors*, 459 U.S. at 526.

Second, and in any event, Discon accepts that it must prove "a specific intent to monopolize a market, that is intent to create or maintain a monopoly by improper means." Discon Br. 36. This Section 2 conspiracy standard, which has rarely been addressed by this Court, must be applied to ensure protection against chilling of procompetitive changes of suppliers. The Court has repeatedly acted to ensure such protection for firms' marketplace freedom in other contexts, setting a demanding standard that rejects evidence as legally insufficient when it is no more than ambiguous in implying that the challenged conduct or specific agreement occurred. *See, e.g., Sharp*, 485 U.S. at 726; *Matsushita*, 475 U.S. at 594; *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984). Similarly here: extensive discovery and litigation should not be allowed to proceed on the basis of bare allegations of a specific intent to monopolize or, worse, allegations of facts that make an intent to create and maintain monopoly power by exclusionary means *less* plausible even than the alternative explanation of the conduct laid out in the amended complaint.

Under such a properly established standard for Section 2 conspiracy, the allegations in this case are inadequate. The factual allegations, if proved, would be worse than ambiguous in supporting a claim of specific intent to monopolize: (1) there are no plausible entry barriers that could sustain monopoly power; (2) a buyer like NYNEX has a distinct *dis*incentive to confer monopoly power on an independent firm and thus put itself at that firm's mercy; and (3) the alleged regulatory-fraud profit-making scheme functions without creation of such monopoly power.[13] Permitting expensive litigation to proceed in the face of such facts would undermine the purposes of the antitrust laws. The Section 2 conspiracy claim must fail.

CONCLUSION

The judgment of the court of appeals should be reversed, and the district court's dismissal order reinstated.

Respectfully submitted.

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[13] Discon and the Government rely on *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 374 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), for the notion that a regulated monopolist may have an incentive to create an upstream monopoly. Discon Br. 40; SG Br. 26. But *Olympia* was talking about such a firm's incentive to make *itself* an upstream monopolist—Discon's original theory, which the Second Circuit rejected. That is a far cry from the allegation here: creating monopoly power in an independent firm that could then use it to exploit its buyers. We are aware of no precedent finding the latter allegation plausible or sustaining an antitrust claim based on it.